

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 March 2006

BALCA Case No.: 2005-INA-00061
ETA Case No.: P2002-CA-09535507/JS

In the Matter of:

INTERNATIONAL COMMODITIES DISTRIBUTORS, INC.,
Employer,

on behalf of

GUSTAVO INIESTRA-BUENAVENTURA,
Alien.

Appearance: Gary H. Maulkin, Esquire
Fountain Valley, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone**¹
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Packaging Supervisor.² The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

² Permanent alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in

STATEMENT OF THE CASE

The job

The Employer is a wholesaler of nuts and dried fruits. On April 3, 2001, it filed an application for labor certification to enable the Alien to fill the position of Packaging Supervisor. (AF 212). The salary was \$24.13 per hour. The Employer specified a requirement of two years of experience in the job offered. The job duties were described as follows:

Supervises and coordinates activities of workers engaged in packaging products and materials for shipment. Studies production order to ascertain type and quantity of product, containers to be used, and other packaging requirements. Inspects products prior to packaging and returns rejected products to production departments. Observes packaging operations and inspects containers to verify conformance to specifications. Starts, adjusts, and repairs packaging machinery, or notifies maintenance department. Trains workers in operation of equipment. Requisitions containers and other supplies for delivery to work stations.

The recruitment and the resumes of rejected applicants

The Employer advertised the position in the Los Angeles Times for three days in July 2002 and received thirty-eight applications. In a letter detailing its recruitment results, the Employer indicated that all thirty-eight applicants were not qualified for the position. (AF 219). The labor certification application was ultimately denied by the CO on the ground that the rejection of four of those applicants -- Monroe, Hamlin, Hayes, and Kolb -- was not for lawful, job-related reasons in violation of 20 C.F.R. § 656.21.

Monroe's resume shows experience in packaging supervision from 1981 to 2001 with manufacturers of CDs and DVDs, computers, and various other products. (AF 322). Her resume

this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004).

states that she has had "hands-on production supervisory responsibilities," that she is "[s]killed in troubleshooting and problem resolution," and that she had trained and supervised machine operators in matters such as equipment maintenance. (*Id.*) Hamlin's resume shows supervisory experience in manufacturing and production facilities from 1967 to 2001 involving a variety of products, including roofing materials, furniture, bricks, vitamins, and building materials. (AF 320-321). His cover letter states that over 25 years of his experience was hands-on, and included production and assembly/packaging. (AF 319). Hayes' resume shows supervisory experience in manufacturing and production -- including packaging -- for manufacturers and distributors related to the food service industry, plastics manufacturing, and retail furniture. (AF 370). Kolb's resume shows over 27 years of experience in ophthalmic and injectable production, including supervisory packaging experience from 1991 to 2001 at a pharmaceutical company. (AF 371).

The recruitment report

According to the Employer's recruitment report, Monroe was interviewed over the phone, but after the interview it was determined that she could not perform the job duties because she had "no experience in starting, adjusting, and repairing packaging machinery, which is a core job duty. The applicant's main experience is in overseeing employees packaging products. She does not have hands-on experience in dealing with machinery for packaging materials." (AF 225).

Hamlin was interviewed over the phone. After the interview it was determined that he could not perform the job duties because he assertedly did not have the required two years of experience in the job, and specifically had "no experience in starting, adjusting, and repairing packaging machinery, which is a core job duty. The applicant's main experience is in manufacturing goods and coordinating employee's shifts. He does not have hands-on experience in dealing with machinery for packaging materials." (AF 223).

Hayes was interviewed over the phone. After the interview it was determined that he could not perform the job duties because he assertedly did not have the required two years of experience in the job, and specifically had no recent work experience, and "no experience in starting, adjusting, and repairing packaging machinery, which is a core job duty. The applicant's main experience is in delivering, scheduling and purchasing goods. He does not have hands-on experience in dealing with machinery for packaging materials." (AF 223).

Kolb was also interviewed over the phone. After the interview it was determined that she could not perform the job duties because she had "no experience in starting, adjusting, and repairing packaging machinery, which is a core job duty. The applicant's main experience is in production managing, which focused on overseeing employees filing and inspecting products. She does not have hands-on experience in dealing with machinery for packaging materials." (AF 224).

The Notice of Findings

On April 13, 2004, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the ground that the Employer had unlawfully rejected the four U.S applicants discussed above. (AF 207-210). The CO found that Monroe had over 20 years of experience as a packaging supervisor, the core duties of which were overseeing the activities of employees packaging products. The CO noted that the Employer's job description was generic, therefore indicating that experience in each possible job duty was not required. In regard to the Employer's rejection of Monroe for not having experience in starting, adjusting, and repairing packaging machinery, the CO observed that Monroe's resume specifically references experience in training and supervising machine operators in operation and maintenance. The CO was not persuaded that Monroe would have contradicted her own resume in the telephonic interview. Finally, the CO observed that it appeared that the Employer had not required machinery repair experience of the Alien before hiring him.

In regard to Hamlin, the CO observed that he was also rejected for not having experience in starting, adjusting, and repairing packaging machinery, but that the Employer's job description was essentially quoted from the Dictionary of Occupational Titles, which did not provide evidence of a specific job requirement of specific machinery experience. The CO noted that Hamlin's resume showed about 25 years of experience, with about two years of specific experience under the job title of packaging supervisor, and subsequent experience at higher supervisory levels which may have encompassed packaging supervision as well. The CO observed that, in fact, Hamlin may have been overqualified.

The CO concluded that Hayes was qualified with almost 25 years of experience "as a manager of a plastics department with supervisory duties that included packaging." Kolb likewise was considered qualified by the CO because her resume showed about 10 years of experience "as the supervisor of an 11 person crew with duties that included packaging."

The NOF concluded by directing the Employer to establish that these applicants were recruited in good faith and were rejected solely for lawful, job-related reasons. The CO directed that if the Employer contended that the telephonic interviews were lengthy, telephone records should be submitted to support this contention.

The rebuttal

The Employer submitted rebuttal on May 17, 2004 contending that the requirement of having experience in starting, adjusting and repairing packaging machinery was a business necessity, as an employee must have knowledge of and be familiar with the machines, because these pieces of equipment require a person from the manufacturer to be sent from Chicago to train individuals on how to use the equipment. (AF 195). The cost to hire a trainer was an hourly rate of \$250.00 per hour plus travel time, accommodations and food.

According to the Employer, it relied on the packaging supervisor to supervise and coordinate activities to ensure the safety of workers and the smooth operation of machinery, and to be in compliance with government regulations in processing food. The Employer claimed that applicants Monroe, Hamlin and Kolb were rejected because they lacked experience in food packaging -- and with respect to Hamlin -- because he did not meet the minimum requirements and was requesting a wage of \$30.00 to \$50.00 per hour. According to the Employer, Hayes was rejected because he lacked the main experience to perform the job duties, inasmuch as he did not have the specific two years of experience in packaging, but rather his experience was in general management. The Employer further contended, in response to the CO's determination that the Employer did not require any machinery repair experience for the Alien, that the immigration officer decides if the Alien has the credentials for the job and if the NOF is questioning the Alien's credentials, then "the NOF has no jurisdiction over this particular matter."

The Final Determination

A Final Determination was issued on June 15, 2004. (AF 187). The CO noted that the Employer had initially rejected applicants Hayes and Kolb because they lacked experience, applicant Monroe because her experience was supervisory and not "hands on," and applicant Hamlin because he did not have two years of experience in the job. The CO observed that the Employer's rebuttal stated that the four applicants in question were rejected for the following, slightly different reasons: Monroe lacked experience in food packaging and her experience was limited to electronic packaging, not fruit and nuts; Hamlin was rejected because he did not meet the minimum requirements and lacked experience in food packaging; Hayes lacked the main experience to perform the job duties; and Kolb lacked experience in food packaging. The CO noted that the rebuttal also included an argument that there was a business necessity for experience in food packaging.

According to the CO, the Employer had the opportunity to state special requirements when the application for labor certification was submitted. The job description as submitted made no reference to what product was to be packaged and there was no indication that the

Employer's requirement of two years of experience was industry specific. If the Employer had required experience with any specific machinery or packaging a specific commodity, the issue of whether the requirement was restrictive could have been addressed by the local office and if raised, the Employer would have been asked to justify the business necessity of the experience. In this case, however, the Employer only submitted a general job description for a packaging supervisor and did not raise the issue of fruit and nut packaging experience until after the issuance of the NOF. Employer's failure to raise lack of experience in fruit and nut handling until after the NOF weakened its rebuttal, as did the fact that this was not listed as a requirement in the application.

With regard to Hamlin, the CO noted that the NOF had pointed out that the applicant's letter and resume showed about twenty-five years of experience, and his job title was packaging supervisor for about two years. The Employer's rebuttal discounted the experience as insufficient without showing how his experience was actually less than two years. The NOF, however, had advised the Employer that the documentation of the interview of the applicant was insufficient to show that he lacked two years of experience as a packaging supervisor, and the Employer failed to submit any additional information or documentation. The CO concluded that the Employer had failed to justify the rejections of these four applicants and denied certification.

The Motion to Reconsider/Brief on Appeal

On July 16, 2004, the Employer filed a Motion to Reconsider/Brief on Appeal. (AF 1, 4). The CO denied reconsideration on August 4, 2004 (AF 16), and the matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board") (AF 1).

The Employer's request for review argues that the nature of the Employer's business activity -- fruit and nut packaging -- was listed in the ETA 750A at item 8, and that it is entitled to require experience related to that business activity. The Employer argued that the CO therefore improperly ignored its rebuttal, which was that Monroe's expertise was in the electronic

industry, that Hamlin's experience was limited to metal packaging, that Hayes had been unable to show that he had two years of experience in packaging as opposed to general management, and that Kolb's expertise was limited to pharmaceutical packaging. The Employer also noted that the CO ignored the rebuttal that Hamlin was seeking a higher wage than was being offered. (AF 1-8).

DISCUSSION

The four U.S. applicants whom the CO found to be unlawfully rejected in this matter each had resumes which, on their face, indicate relevant experience in the supervision of packaging. Where a U.S. applicant's resume indicates that he or she meets the broad range of experience, education, and training required for the job, thus raising the reasonable prospect that the applicant meets all of the Employer's stated actual requirements, the Employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the actual requirements. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (en banc). In this case, the Employer interviewed each of the four applicants by telephone, but rejected them for various reasons. On appeal, the Employer essentially argues that it could lawfully reject those applicants because they either did not have direct experience in food packaging or in packaging machinery maintenance and repair, or in the case of applicant Hayes,³ because he had experience that was in generic management of production and not specifically in packaging.

What job duties were specifically required

Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. An employer cannot rely on lack of experience in a particular job duty to reject U.S. workers where

³ In the recruitment report, Hayes was rejected in part for not having recent work experience. This ground was not repeated in the rebuttal or the argument in the request for review. Rather, the objection to Hayes in rebuttal and on appeal is focused on his experience as being generic managerial rather than specific to packaging. Even if lack of recent experience is still a proffered ground for his rejection, however, the Appeal File contains no explanation of why his experience was not considered recent or why that was important. We find that the Employer failed to provide documentation sufficient to support his rejection for this reason.

such duty was not listed in ETA Form 750A item 14 or 15. *Chromatochem Inc.*, 1988-INA-8 (Jan. 12, 1989) (en banc). Although an employer may contemplate that certain duties specified in the job description may require certain education and/or experience, those requirements must be specified by the employer; they will not be implied. *Universal Energy Systems, Inc.*, 1988-INA-5 (Jan. 4, 1989) (en banc). One of the purposes of Items 14 and 15 is "to notify the C.O. of Employer's minimum requirements so that the C.O. may, if necessary, challenge the stated requirements as unduly restrictive or as not the actual minimum. See 20 C.F.R. §§656.21(b)(2) and 656.21(b)(6)." *Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988) (en banc).⁴

In the instant case, the Employer did note in Item 8 that it was a fruit and nut producer. It in no way spoke to any specific requirements in Items 14 or 15, however, indicating that the job required specialized experience in food packaging machinery. For this ground alone, the U.S. applicants who had the requisite experience in the supervision of packaging were unlawfully rejected.

Moreover, we observe that the CO correctly found that that the first time the Employer raised lack of specific experience in food packaging as grounds for rejection of the applicants

⁴ The Employer's brief cites several decisions suggesting that it is relying on *Ashbrook-Simon-Hartley v McLaughlin*, 863 F.2d 410 (5th Cir 1989), for the proposition that the nature of the Employer's business must be considered when determining whether a U.S. applicant is qualified for the job. But *Ashbrook-Simon-Hartley* ruled

In addition, the application itself, which is a form promulgated by the DOL, gives no indication that the minimum job requirements listed by the employer will be the only factor considered by the DOL in determining whether an employer has a valid reason for rejecting a domestic worker. The minimum job requirements section of the form simply provides small boxes for listing the number of years of formal education and training the employer requires. This space on the application makes explicit reference to the job duties--the employer is instructed to state "the minimum education, training, and experience for a worker *to perform satisfactorily the job duties described in item 13 above.* " (emphasis added) Thus, the application form itself, like the governing statutes and regulations, clearly contemplates that the DOL will consider the ability of the U.S. worker applicants to perform the job as described by the employer.

Thus, *Ashbrook-Simon-Hartley* recognizes that the Employer must describe the job on the ETA Form; the thrust of the decision is that DOL cannot simply ignore the job duties described in Item 13. To the extent that *Ashbrook-Simon-Hartley* possibly suggests that an employer is not required to specify all requirements for the position on the application, the Board has not extended that possible interpretation outside the Fifth Circuit. See, e.g., *Bo Packing*, 1994-INA-443 (Feb. 6, 1996).

was in rebuttal to the NOF.⁵ Additionally, the recruitment report in which 38 applicants were rejected never mentioned lack of experience in food packaging as a reason for rejection of any of the applicants. Rather, the recruitment report focused solely on the lack of relative experience of applicants in packaging machinery versus other manufacturing, production or management functions. Thus, the credibility of the Employer's argument in the rebuttal and request for review about the requirement of specific experience in food packaging is suspect, as it appears to be an after-the-fact addition to the original grounds stated for rejection of applicants.

The recruitment report stated that the four applicants at issue had "no experience in starting, adjusting, and repairing packaging machinery, which is a core job duty." The statement of the job duties in the ETA 750A actually states, however, "[s]tarts, adjusts, and repairs packaging machinery, or notifies maintenance department." (AF 212) (emphasis added). Thus, the Employer's job description suggests that an incumbent need not necessarily work directly on the equipment but may notify maintenance workers to perform such a function. Indeed, the job was described as a "Packaging Supervisor" and not a packaging machinery engineer. Thus, the Employer's rejection of several of the applicants because their experience tended to be more supervisory than "hands-on" is of dubious credibility. Moreover, the CO correctly pointed out that Monroe's resume specifically noted such experience, and that it seems unlikely that she would have reversed this assertion in an interview. The Employer did not address this point about Monroe's qualifications in either the rebuttal or the request for review.

The Employer may have a stronger case for rejection of Hayes, since his resume does tend to support a finding that his experience may have been too generic to be qualified as a packaging supervisor. Nonetheless, Monroe, Hamlin and Kolb all appear on the face of their resumes to have been qualified for the job as described in the ETA Form 750 A, Items 13, 14 and 15. Accordingly, we affirm the CO's denial of labor certification for unlawful rejection of these three applicants.

⁵ Monroe, Hamlin and Kolb were rejected -- according to the rebuttal and request for review -- for lack of experience with food packaging. Hayes, whose resume shows some food industry experience, was rejected for having experience that was too generic and not specific enough to packaging.

The Alien's experience

The Employer's argument on rebuttal that the question of whether the Alien is qualified for the position is the sole province of the U.S. Citizenship and Immigration Services ("USCIS") is untenable. Where an alien is hired without the experience now required of U.S. applicants, that requirement may be found not to be an actual minimum requirement and therefore in violation of the regulation at 20 C.F.R. § 656.21(b)(5). *James Northcutt Associates*, 1988-INA-311 (Dec. 22, 1988) (en banc). Thus, the alien's experience in the duty is a relevant consideration in determining whether U.S. workers were unlawfully rejected. See *Ron Hartgrove*, 1988-INA-302 (May 31, 1989) (en banc) (Board directed the CO to examine this issue on remand).⁶ In the instant case, one of the primary grounds stated by the Employer for rejecting each of the four applicants in question was lack of "experience in starting, adjusting, and repairing packaging machinery." If the Alien was hired without experience in repairing machinery, and the Employer is now rejecting U.S. applicants for lacking such experience, the Employer's rejection of those applicants is unlawful within the meaning of the labor certification regulations. Since the Employer did not claim that the Alien had such experience prior to hire, but rather raised the argument that only the INS could investigate the Alien's qualifications, we draw the conclusion that the CO was correct in his assessment on this point.

Hamlin's salary requirements

Because we find that Monroe and Kolb were unlawfully rejected for lacking the requisite experience, it is not necessary to decide whether Hamlin was lawfully rejected for the alternative reason of expressing a desire for a higher salary than the one being offered. We observe, however, that the Board has ruled that an applicant's expression of concern about a low salary is not sufficient grounds for rejection of the applicant. Rather, for the employer to lawfully reject a

⁶ The Employer's cites in this respect *Singh v. Attorney General*, 510 F.Supp. 351 (D.D.C. 1980), *aff'd* 672 F.2d 894 (D.C. Cir. 1981) (table). However, the issue in *Singh* was whether the INS (now USCIS) has the authority to investigate the credentials of an alien once the DOL has granted a certification; it does not stand for the proposition that only the USCIS can investigate the credentials of the alien. Rather, the D.C. Circuit has specifically recognized that the Department of Labor has the authority to "gauge an alien's skill level in evaluating the effect of the alien's employment on United States workers." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983).

U.S. applicant on this basis the position must be offered to the applicant and the applicant must then decline the position based on the low salary offered. *Impell Corp.*, 1988-INA-298 (May 31, 1989) (en banc). There is no indication in the Appeal File that Hamlin was offered the job. As the CO observed, Hamlin may have been overqualified for the job. However, his cover letter indicates that he had recently been the victim of layoff. Given his circumstances, he may well have been willing to accept the Employer's salary had it been offered. Accordingly, we find that this alternative ground for rejection of Hamlin is insufficiently documented to provide lawful grounds for rejection.

ORDER

The Final Determination by the Certifying Officer denying labor certification is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with

supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.